18-60522

In The
United States Court Of Appeals
For The Fifth Circuit

DISH NETWORK CORPORATION,
Petitioner/Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent/Cross- Petitioner.

ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF OF INTERVENOR COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO IN SUPPORT OF RESPONDENT/CROSS-PETITIONER NATIONAL LABOR RELATIONS BOARD

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Case No. 18-60522

DISH NETWORK CORPORATION,
Petitioner/Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent/Cross Petitioner.

CERTIFICATE OF INTERESTED PARTIES

Pursuant to Fifth Circuit Rule 29.2, the undersigned counsel for Intervenor Communications Workers of America, AFL-CIO certifies that the following listed entity, in addition to those listed in the parties' briefs, has an interest in the outcome of this case. This representation is made in order for the judges of this court to evaluate possible disqualification or recusal.

1. DISH Network Corporation—Petitioner/Cross-Respondent.

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11. David Van Os & Associates, P.C.—Counsel for Intervenor Communications Workers of America, AFL-CIO.

12. Matthew Holder—Counsel for Intervenor Communications Workers of America, AFL-CIO.

The undersigned counsel of record further certifies pursuant to Federal Rule of Appellate Procedure 26.1(a) that Intervenor Communications Workers of America, AFL-CIO is not a publicly held corporation, does not have a parent corporation, and does not issue stock.

Respectfully submitted,

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STATEMENT REGARDING ORAL ARGUMENT

Intervenor Communications Workers of America, AFL-CIO agrees with the National Labor Relations Board that this case is one of simply applying settled law to the underlying facts. As such, Intervenor Communications Workers of America, AFL-CIO does not view oral argument as necessary to decide this case. Should the court determine oral argument would benefit the resolution of the issues in this case, Intervenor Communications Workers of America, AFL-CIO requests permission to participate in oral argument.

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STATEMENT OF JURISDICTION

DISH Network Corporation ("DISH") petitioned for review of the decision and order of the National Labor Relations Board ("NLRB" or "the Board") in *DISH Network Corporation*, 366 NLRB No. 119 (2018). (ROA.2168-82). The Board has filed a cross-application for enforcement of its order. Communications Workers of America, AFL-CIO ("CWA" or "the Union") timely intervened in this case in support of the Board. The court has jurisdiction over the petition for review and cross-application for enforcement under Sections 10(e) and (f) of the National Labor Relations Act ("the Act" or "NLRA"), 29 U.S.C. §§ 160(e) and (f).

STATEMENT OF THE ISSUES

At its core, this case presents two issues for review. The first is DISH's violation of Section 8(a)(5) of the Act, 29 U.S.C. § 158(a)(5), when in April 2016 DISH refused to bargain and unilaterally imposed a severe wage cut and changed working conditions in a bargaining unit represented by CWA in North Richland Hills, Texas and Farmers Branch Texas. The second issue is whether DISH constructively discharged seventeen bargaining unit employees following its April 2016 unilateral changes, including the drastic wage cut, in violation of Section 8(a)(3) of the Act, 29 U.S.C. § 158(a)(3).

STATEMENT OF THE CASE

a. The history of negotiations between the parties.

The parties to this litigation have previously been before the court in a case that upheld an injunction obtained by the Board under Section 10(j) of the Act, 29 U.S.C. § 160(j). *Kinard v. DISH Network Corp.*, 890 F.3d 608 (5th Cir. 2018). In 2009, DISH introduced at select facilities a pilot compensation system for technicians called "Quality Performance Compensation" or "QPC" that featured a low base pay and incentive pay determined by the technicians meeting certain performance bars. *DISH*, 890 F.3d 608 at 611. CWA became the representative of DISH technicians and warehouse employees at two of the locations where QPC was introduced, Farmers Branch, Texas and North Richland Hills, Texas, in 2010 and 2011, respectively, and the parties began negotiations for a first contract in 2010. *DISH*, 890 F.3d at 611.

During the course of negotiations, the Union proposed wage scales in March and May of 2013 that would replace QPC with a higher hourly wage and an incentive program called Pi, DISH's incentive plan in place at its non-union facilities. (ROA.329, 1410, 1412). DISH rejected these proposals because, as testified to by its original negotiator George Basara, DISH wanted to drive CWA's proposals further down by holding its wage proposals at only an hourly wage rate with no incentive. (ROA.1089). The Union would later learn that

DISH would save "2.1 million dollars" over a three year period by not providing bargaining unit employees with an incentive program. (ROA.457-58, 1594). DISH's rejections in March and May 2013 of the Union's wage proposals prompted the Union to return to proposing the continuation of the QPC beginning on July 9, 2013. (ROA.372, 392).

Despite the parties' differences on wages, they were able to reach agreement on approximately eighteen issues during the course of bargaining. (ROA.380, 1716). By November 21, 2013, approximately five issues, wages, seniority, grievance and arbitration, dues deduction and contracting, remained. (ROA 381, 1712). The parties did not meet following the November 21, 2013 session until July 23-24, 2014. (ROA.462, 465). The parties scheduled November 4-6 and 18-20, 2014 for further bargaining, but DISH canceled the November 4-6 dates because of a conflict with the schedule of its human resources representative, Pam Arnold. (ROA.1162-63, 1945). The cancellation of this bargaining session was consistent with the parties' practice of accommodating one another's schedule. (ROA.350-53, 1589, 1591). CWA requested replacement dates for the November 6-8 sessions in an email dated October 31, 2014 (ROA.1945) and December 8-9, 2014 were subsequently agreed to as the replacement dates for November 4-6. (ROA.1557).

b. The November 2014 bargaining and events of December 2014.

The parties bargained again on November 18-20, 2014. (ROA.476). CWA Assistant to the Vice President Sylvia Ramos, who had assumed the role of bargaining chair for the Union at that time, could not attend the November 18-19 sessions due to a schedule conflict. (*Id.*). The Union provided DISH with a comprehensive package of proposals, including wages, over the course of November 18-19. (ROA.1820-26). This proposal included maintaining the QPC for the technicians.

These proposals were rejected by DISH. (ROA.1727). DISH countered with its "Final Proposal" dated November 18th, but passed to CWA on November 19th. (ROA.1362). Dish's November wage proposal for the life of the agreement proposed Field Service Specialist ("FSS") I technicians, the first level techs, earn $13.00 per hour, FSS IIs make $14.00 per hour, FSS IIIs be paid $16.00 per hour, and FSS IVs earn $17.00 per hour. None of the technician titles would participate in an incentive program. (*Id.*).

The wage rates proposed by Dish for its two Union facilities were significantly lower than the normalized wage rates, which takes into account overtime and incentives, paid by Dish at its non-union facilities. Dish's wage proposal for FSS Is was up to $2.70 per hour lower than what it paid at its other Dallas-Fort Worth are facilities, for FSS IIs was up to $3.89 per hour, for FSS IIIs

it was up to $3.16 per hour, and for FSS IVs was up to $4.75 per hour lower. (ROA.1362, 1866).

On November 20th the parties continued to bargain and discuss DISH's November 19th proposal. (ROA.477, 1557). The Union questioned DISH about how wages in its November 19th proposal were formulated and why they were significantly lower than those of other DISH facilities in Dallas-Fort Worth area. (ROA.557). The parties agreed to reconvene on December 8-9, 2014 to continue bargaining. (ROA.1557, 1958).

On December 4th, CWA informed DISH that it needed to reschedule the December 8-9 bargaining dates because of a death in Ramos's family. (ROA.1434, 1473). The Union offered replacement dates in January and February 2015 and Basara responded to this correspondence by stating, in relevant part, "If you do not meet with us as scheduled, and you also refuse to provide a proposal in writing, we will consider the bargaining to be at impasse." (ROA.1434). Ramos responded to Basara later on December 4th by stating CWA would prepare proposals to DISH in response to its November 2014 proposal, but that in doing so it would not waive its right "to meet with you and discuss face-to-face your response." (ROA.1439). Ramos also noted that in addition to the dates previously proposed by CWA she would consider any dates offered by Dish. (*Id.*). Basara

responded on December 5th by stating "Please forward your proposals." (ROA.1437).

CWA forwarded its proposals to Dish on December 9, 2014 and noted that the Union continued "to stand firmly on the need to bargain over our proposals." (ROA.1378). CWA proposed as to wages on December 9th a two-tiered scheme whereby current technicians would remain on QPC and new hires would be placed on an hourly wage scale plus Pi. (ROA.1388). DISH offered later on December 9th to meet the following week. (ROA.1603). Ramos responded on December 11th that she was not available for the remainder of December, but would be willing to schedule bargaining during the first two weeks of January 2015. (ROA.1443).

On December 18, 2014, despite CWA's expressed desire to meet and discuss its December 9th proposals, Basara provided a written response (ROA.1371-77), which included DISH's "Last, Best & Final Offer." (ROA.1376-77). This proposal was identical to its November 2014 proposal in terms of technician wages. Basara's December 2014 response also stated that DISH wanted the proposal sent to the bargaining unit for a ratification vote and at that point the parties could "discuss if further bargaining is warranted." (ROA.1374).

Ramos responded to Basara's December 18th correspondence on December 30, 2014 and reiterated that CWA had reserved the right to bargain over its December 9th proposals and that the previously cancelled December 8-9 bargaining

dates were replacement dates for November bargaining sessions that DISH cancelled. (ROA.1398, 1400). Basara responded on December 31st by stating that "it does not appear that you are willing to take our final offer to your bargaining unit." (ROA.1401). Basara also informed Ramos that he would no longer be representing Dish and that Brian Balonick would be contacting her on behalf of Dish "sometime after the new year." (*Id.*).

c. *DISH's 2016* fait accompli, *the proverbial smoking gun, unilateral changes, and resulting constructive discharge of seventeen employees*.

DISH, despite Basara's statements to Ramos, did not contact the Union during 2015. (ROA.69). Ramos did not attempt to contact Balonick because she had been told by Basara that Balonick would contact her and that the parties had gone eight months, from November 2013 to July 2014, without bargaining in the past, so she did find the passage of one year to be inconsistent with the practice of the parties. (ROA.596).

Balonick finally wrote to Ramos on January 8, 2016 and stated that Basara's "November 19, 2014 letter to you presented DISH's last, best and final offer." (ROA.1405). Balonick further indicated in regards to that offer that the Union was "unwilling to take it to your bargaining unit." (*Id.*). Balonick closed the letter by noting that since the "November 19th" proposal was Dish's last, best and final offer, it did not appear that "further bargaining would be productive." (*Id.*). Ramos responded to Balonick on January 13th and reiterated that CWA had

reserved the right to bargain over its December 9th proposals and requested Balonick provide bargaining dates. (ROA.1407-08).

Balonick responded on February 2, 2016 that he viewed Ramos's letter of January 13th as evidence that "the parties have remained rigid in their respective positions." (ROA.1427). Ramos responded in correspondence dated February 3rd by requesting bargaining dates. (ROA.1447). Balonick responded to that letter on April 4, 2016 by informing Ramos that DISH would be implementing its December 2014 last, best and final offer. (ROA.1429). Ramos wrote on April 12th and again demanded bargaining dates to discuss the outstanding issues, including wages. (ROA.1452). Balonick's April 19th response restated the assessment of the bargaining contained in his prior correspondence but also noted that "the Union refuses to vote on" DISH's last, best and final offer of December 2014. (ROA.1461).

Balonick testified at the hearing that the strategy behind his dealing with Ramos and the Union during the winter and spring of 2016 was that he wanted to test them "to see how serious they were about trying to reach an agreement." (ROA.122). Balonick went on to testify

> So I wrote that letter in January of '16 inviting them to show us something that -- anything that they were interested in a contract where it wasn't QPC. I wrote more than one letter, I know one letter was shown to me. I wrote three letters, I believe, practically begging them to show me anything, something, so that -- you know, if they

> showed me a new proposal, I'd be willing to meet with them. (ROA.122-23).

Balonick dismissed out-of-hand Ramos's requests to meet and bargain. (ROA.123). Balonick also acknowledged that the Union had proposed a wage rate for new hires while maintaining the QPC for current employees. (ROA.124). Despite this fact, DISH maintained that bargaining would be fruitless and continued to refuse to bargain.

While DISH was refusing to meet with CWA, North Richland Hills Field Service Manager Hanns Obere inadvertently sent a text message on or about April 6, 2016 to Kenneth "Blake" Daniels that can only be described as a smoking gun revealing that DISH's objective behind its refusal to bargain was to implement a wage rate so low as to force employees to quit. The text, supported by Obere's testimony at trial, establishes that its contents were not the product of a single manager, but the objects

> The union is gone. Techs will be affixed [sic] hourly rates, no pi. Level 4 will earn 17 dollars an hour. They will earn like the rest of the company if they transfer to other offices which they encourage. They have QPC till the 23rd. The two offices are gradually closing. We will be dispatched to other offices or a new one will be started. They would rather have the techs quit en mass [sic]. Seatbelt for bumpy ride. Call me when you have a minute. (ROA.1470-72).

Obere attributed the facts stated in his text to Regional Manager Thomas Nicholas, who had met with Obere the morning of April 6th. (ROA.183-86). Obere also testified that DISH undertook the proposed changes understanding that employees

might respond by quitting. (ROA.186). This testimony is consistent with the statement that Obere provided DISH, wherein Obere claimed Nicholas told him it would be preferable "if the technicians resigned on their own." (ROA.212, 1852).

DISH imposed its wage cut on or about April 23, 2016. The unilateral change to wages resulted in an approximate pay cut of upwards of $5.26 an hour for FSS Is, a cut of upwards of $14.04 an hour for FSS IIs (cutting their pay almost in half), a cut of upwards of 14.74 an hour for FSS IIIs (another pay-cut of almost half), and a cut of upwards of $11.63 an hour for FSS IVs. (ROA.1370, 1429, 1866). By the time of the trial in late 2016, FSS Is represented by CWA earned approximately $2.00 less an hour than non-union techs, FSS IIs earned approximately $2.5 an hour less than non-union techs, FSS IIIs earned approximately $3.00 a hour less than their non-union counterparts, but FSS IVs earned upwards of $10.00 an hour less than non-union FSS IV technicians. (ROA.1972-73, n. 1).

As foreshadowed by the Obere text, employees did quit in response to the wage cuts and seventeen employees were ultimately found by the NLRB to have been constructively discharged. (ROA.2170, n. 8, 2175). DISH made other unlawful unilateral changes in working conditions in addition to the changes in wage rates. DISH changed its sick days and paid days off to create one pool called paid time off ("PTO") on April 23, 2016. (ROA.773, 822). Dish also changed

health insurance benefits in a manner that resulted, according to bargaining unit employee Jason Morris, in deductibles doubling from $2,500.00 to $5,000.00. (ROA.410, 1668). The changes to health care benefits became effective on July 1, 2016. (ROA.831-32). The Union filed unfair labor practice ("ULP") charges with the Board, the Board obtained an injunction restoring the wage rates to their pre-implementation level, and the Board ultimately found DISH to have unlawfully refused to bargain and impose unilateral changes in violation of Section 8(a)(5) of the Act and constructively discharged seventeen employees in violation of Section 8(a)(3). (ROA.2168-82).

SUMMARY OF ARGUMENT

This case concerns unilateral changes and DISH's refusal to bargain, which were unlawful because the parties were not at impasse. Therefore DISH's unilateral changes in April 2016 were not privileged and unlawful in violation of Section 8(a)(5) of the Act and DISH's ongoing refusal to bargain is inconsistent with the temporary nature of a bargaining impasse. Substantial evidence supports the proposition that no impasse existed because the Union's concession in its December 2014 proposal to a two-tier wage scale that would limit QPC to current employees created an opportunity for the parties to come to agreement that DISH unlawfully refused to explore in 2016 when it declared impasse and cut wages. The parties' prior agreement to bargain over the Union's December 2014 proposal

further undermines the argument that the parties were at impasse. Finally, as evidenced by DISH's letter writing campaign, DISH's conception of impasse as a static, permanent state is incorrect under the law and ignores how phenomenon such as the passage of time and change in negotiators can provide an opportunity for bargaining to proceed.

In regards to the constructively discharged employees, substantial evidence shows that DISH created intolerable working conditions by depriving bargaining unit employees of the right guaranteed by the Act to working conditions negotiated by the their bargaining representative when it unilaterally imposed the April 2016 wage cut and cut in benefits because these changes were undertaken, as evidenced by the Hanns Obere text, for the purpose of destroying support for CWA. Additionally, CWA joins with the arguments advanced by the NLRB in its brief to the court.

ARGUMENT

STANDARD OF REVIEW

A court's review of a decision and order by the NLRB "is limited and deferential." *In-N-Out Burger, Inc. v. NLRB*, 894 F.3d 707, 714 (5th Cir. 2018). The Board's legal conclusions are reviewed *de novo* and will be upheld if they are reasonably based on the National Labor Relations Act, 29 U.S.C. § 151 *et seq.* ("the Act"). *In-N-Out Burger*, 894 F.3d at 714; *Strand Theatre of Shreveport Corp. v. NLRB*, 493 F.3d 515, 518 (5th Cir. 2007).

The Board's fact-finding will be upheld so long as it is supported by substantial evidence. 29 U.S.C. § 160(e). "Substantial evidence is that which is relevant and sufficient for a reasonable mind to accept as adequate to support a conclusion. It is more than a mere scintilla, and less than a preponderance." *El Paso Elec. Co. v. NLRB*, 681 F.3d 651, 656 (5th Cir. 2012). Substantial evidence is also understood as relevant evidence sufficient that a reasonable person would rely on it in coming to a conclusion. *J. Vallery Elec., Inc. v. NLRB*, 337 F.3d 446, 450 (5th Cir. 2003).

The court gives significant deference to the Board's application of the law to the facts due to "the Board's primary responsibility for administering the Act and its expertise in labor relations," and the court "will not disturb 'plausible inferences [the Board] draws from the evidence, even if we might reach a contrary result were we deciding the case *de novo*.'" *In-N-Out Burger* at 714 (quoting *Valmont Indus., Inc. v. NLRB*, 244 F.3d 454, 463 (5th Cir. 2001)). Identical standards are applied to the decision of an administrative law judge ("ALJ") when the Board adopts the ALJ's decision. *In-N-Out Burger* at 714.

I. DISH's unlawful unilateral changes and unlawful refusal to bargain in violation of Section 8(a)(5).

It is an unfair labor practice under Section 8(a)(5) of the Act, 29 U.S.C. § 158(a)(5) for an employer to refuse to bargain with the representative of its employees. Section 8(d), 29 U.S.C. § 158(d) further requires parties to a collective

bargaining relationship under the Act "to meet . . . and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . ." Collective bargaining "presupposes a desire to reach ultimate agreement, to enter into a collective bargaining contract. *NLRB v. Ins. Agents' Int'l Union, AFL-CIO*, 361 U.S. 477, 485 (1960). The employer and the union representing its employees must bargain "with an open and fair mind, and sincere purpose to find a basis of agreement." *NLRB v. Herman Sausage Co.*, 275 F.2d 229, 231 (5th Cir. 1960).

The duty to bargain, however, "does not compel either party to agree to a proposal or require the making of a concession." 29 U.S.C. § 158(d). While a party need not concede on a legitimate position it takes in bargaining, but it must "make a sincere, serious effort to adjust differences and reach an acceptable common ground." *NLRB v. Blevins Popcorn Co.*, 659 F.2d 1173, 1187 (D.C. Cir. 1981). An employer violates its obligations under Sections 8(a)(5) and 8(d) if it unilaterally changes working conditions. *NLRB v. Katz*, 369 U.S. 736, 743 (1962).

An exception to this rule exists if the parties have reached a legitimate bargaining impasse. *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 198 (1991). "Good-faith bargaining is a 'necessary precondition' to finding an impasse." *Carey Salt Co. v. NLRB*, 736 F.3d 405, 411 (5th Cir. 2013) (quoting *Elec. Mach. Co. v. NLRB*, 653 F.2d 958, 963 (5th Cir. 1981)). As the court has held, "without good faith, the bargaining itself is unlawful, as is any impasse purportedly reached

therein. *Carey Salt*, 736 F.3d at 411 (citing 29 U.S.C. § 158(d)). The Board's findings as to good faith are reviewed with a heightened deference and will only be upset if "the record as a whole leaves such judgment without reasonable foundation." *Carey Salt* at 412 (citation omitted).

This inquiry requires review of the totality of an employer's conduct, and the substance of those proposals can be reviewed notwithstanding Section 8(d) of the Act "in order to ferret out 'empty talk,' the 'mere surface notions of collective bargaining,'" because "Good faith is inconsistent with a 'charade concealing a desire to frustrate agreement,' notwithstanding conduct that 'on its face' resembles bargaining." *Id.* (citations omitted). As argued below, there was no impasse in the negotiations between DISH and CWA.

a. *CWA's December 2014 wage proposal opened the door to future fruitful negotiations over wages and thereby defeated impasse.*

Proving an impasse based on the bargaining positions of the parties requires DISH to prove in this case that the parties were deadlocked. *Powell Elec. Mfg. Co. v. NLRB*, 906 F.2d 1007, 1011-12 (5th Cir. 1990); *Huck Mfg. Co. v. NLRB*, 693 F.2d 1176, 1186 (5th Cir. 1982). DISH cannot meet this burden because CWA's December 9th wage proposal to grandfather the QPC only for current employees opened the door to further bargaining, which DISH promptly closed by refusing to meet and bargain over the proposal.

As determined by the Board, substantial evidence supports its conclusion that no impasse existed in this case because the Union's movement on wages in its December 9, 2014 proposal offered a significant QPC compromise by a two-tier wage system that preserved QPC for current employees and proposed a wage scale for new hires, and as such DISH "'was not warranted in assuming that further bargaining would be futile.'" (ROA.2169 (citation mitted). DISH challenges this conclusion in its appeal by arguing that the concession was not significant. (DISH Brief at 37-41). DISH's arguments on this issue fail to appreciate that a proposal need only open a door to further discussions in order to defeat impasse; it need not in and of itself resolve the issue. As the court has held on this matter, "Anything that creates a new possibility of fruitful discussion (even if it does not create a likelihood of agreement) breaks an impasse: a strike may, (citations omitted); **so may bargaining concessions, implied or explicit**." *Gulf States Mfg., Inc. v. NLRB*, 704 F.2d 1390, 1399 (5th Cir. 1983) (emphasis added). DISH, on the contrary, contends that only an event that provides a certainty can bar an impasse, and that proposition is not supported by the Act and decisions of the court and the NLRB.

CWA offered DISH specific terms on the question of QPC and thereby offered an explicit concession that moved towards DISH's position by proposing the QPC not be offered to new hires. This proposal was significant because it

would mean no additional technicians would be paid under the QPC. CWA's December 9th proposal in this case is analogous to the five cent wage reduction in the second and third year of a proposed contract that was at issue in *CJC Holdings*, 320 NLRB 1041 (1996), *enfd.*, 110 F.3d 794 (5th Cir. 1997), which the Board held showed "some progress on wages was still being made." *CJC*, 320 NLRB at 1045.

Further, it implicitly suggested the possibility of further movement towards agreement, a possibility that DISH could have explored had it fulfilled its statutory duty to bargain because, as stated by the Administrative Law Judge, "the give and take of bargaining might have lead everyone closer to agreement; DISH's failure to explore the Union's capitulation on this key issue, by definition, precluded impasse." (ROA.2176 (citations omitted)). This implicit possibility is relevant because, as noted above, a proposal need not solve the problem between the parties; it need only point towards a path that could lead to an agreement.

The core of DISH's argument against the significance of the CWA's December 2014 proposal is that it would not provide a significant reduction in the number of QPC participants because the bargaining unit locations had low attrition rates compared to the other, non-union, facilities in the Dallas-Fort Worth area. First, this argument is a red herring because, as discussed above, the proposal need to resolve the matter, it need only point towards a possible resolution. Second, DISH's comparison to its non-union locations obscures the real attrition numbers

at the bargaining unit locations, one of which was 31.40 % attrition in 2014, when the proposal was made, and 19.60% in 2015 and at the other location was 30.50 % in 2014, at the time of proposal, and 13.10% in 2015. (ROA.1803).

These rates of attrition, especially for the year 2014 when the proposal was made, are substantial evidence that CWA's proposal constituted sufficient movement to defeat impasse. This point is not undermined by DISH's arguments that attrition at the bargaining unit locations was not as high as that of the non-union locations. That argument continues to miss the point that a proposal to defeat impasse need only open the way to further discussions that might lead the parties closer. The proposal does not have to resolve the issue in order to keep bargaining moving forward. In that regard, the place for DISH's arguments as to the significance of the proposal is not before the Board or the court, but to CWA at the bargaining table. DISH's refusal to explore the possibility of agreement presented by the December 9th proposal is substantial evidence in support of enforcing the Board's order that the unilateral wage cuts of April 2016 were unlawful changes in violation of Section 8(a)(5) because no impasse existed between the parties.

b. *DISH bargained in bad faith when it conditioned future bargaining on a ratification vote and broke its agreement to meet and bargain with CWA in December 2014.*

1. DISH's insistence on a ratification vote tainted impasse.

The Board concluded that DISH "evidenced a lack of good faith" when it conditioned further bargaining on the Union submitting its last, best, and final offer to a ratification vote. (ROA.2170, n. 6). This conclusion is supported by substantial evidence.

An employer's insistence that a proposal be put out by a union for a ratification vote is a non-mandatory subject of bargaining that undermines the assertion of impasse. *Jano Graphic, Inc.*, 339 NLRB 251, 251 (2003). Dish demanded that CWA put its last, best and final offer out for a vote on December 18, 2014 as a condition for further bargaining. While Basara denied that it was a condition for subsequent bargaining (ROA.1134), the language in his letter of December 18th speaks to the contrary by stating Dish asks the proposal being taken out for a vote and then "we can discuss whether further bargaining is warranted" once Dish knew if the proposal was accepted or rejected. (ROA.1368). This sentence does not make a suggestion; it says that further bargaining, which had been scheduled but unilaterally cancelled by Dish, is now conditioned on a vote by the membership. DISH cannot claim the existence of a lawful impasse in December 2014 because of its insistence on a vote by the Union's membership.

DISH's insistence on a vote by the Union's membership did not end in 2014; Balonick revisited that issue twice in his correspondence to Ramos in 2016. The demand to put the contract out for a vote and the Union's failure to do so were referenced in the letter of January 8, 2016 where Balonick stated "you rejected our offer and were unwilling to take it to your bargaining unit." (ROA.1405). CWA's decision not to hold a ratification vote was raised again by DISH in its letter of April 19, 2016 when it stated the Union "failed to take [the offer] to the employees for a vote." (ROA.1459).

The ratification issue was raised again in the same correspondence and again in the same correspondence when it stated "the unwavering positions of the parties, i.e. that DISH has provided a last, best and final offer **that the Union refuses to vote on** and that the Union requests further bargaining sessions, **demonstrates that the parties are at impasse**." (ROA.1461, emphasis added). Thus, even as of four days prior to the unilateral changes of April 23rd, Dish continued to adhere to its position, contrary to clearly established law, that the lack of a ratification vote justified its refusal to bargain. DISH's insistence on a ratification vote on two occasions in 2016, one a few days prior to the wage cut, is substantial evidence that DISH continued to unlawfully insist on a ratification vote a condition for further negotiations and it therefore contributed to DISH's decision to declare impasse in the same letter where it referenced the lack of a ratification vote. DISH's

insistence on a ratification vote as a condition for further bargaining thus constituted an unlawful refusal to bargain in violation of Section 8(a)(5) and tainted the declaration of impasse.

2. The parties' prior agreement to meet and bargain undermines impasse.

The agreement of the parties to meet and bargain in December 2014 undermines the proposition that the parties are at impasse. *Carey Salt*, 736 F.3d at 415-16. In *Carey Salt*, the union requested on March 18, 2010 a final offer to take back to the bargaining unit so as to assess the employees' position on continued negotiations, with the understanding the parties would return to the table and negotiate on March 31, 2010. *Carey Salt* at 408, 415. On March 31st, the employer met with the union, but left after it confirmed the union's rejection of the offer without engaging in further bargaining. The court held that this perfunctory conduct was evidence of bad faith because the employer was rushing to impasse so as to derail negotiations while knowing the union was coming to the table with the expectation of further negotiations. *Id.* at 415-16.

In this case, following DISH's "Final Proposal" of November 18, 2014, the parties agreed to bargain on December 8-9, 2014 (ROA.1557, 1958). CWA was forced to reschedule that session because of a death in the family of its lead negotiator. (ROA.1434, 1473). DISH countered that it would declare impasse if the parties did not meet and CWA did not provide written proposals. (ROA.1434).

CWA provided proposals to Dish on December 9th and stated explicitly in doing so that CWA would not waive its right "to meet with you and discuss face-to-face your response." (ROA.1439). DISH did not object to the Union's position and responded on December 5th by stating "Please forward your proposals." (ROA.1437). CWA forwarded its proposals to Dish on December 9, 2014 and continued "to stand firmly on the need to bargain over our proposals." (ROA.1398).

Dish did not respond to the December 9th proposals by claiming bargaining was unnecessary. To the contrary, Dish responded by offering on December 9th to bargain the following week. (ROA.1603). The parties prior understanding that additional bargaining would take place on December 8th-9th undermines the existence of impasse, as does DISH's offer to bargain the week following December 9th. Despite these facts, DISH responded on December 18th with a last, best and final offer. (ROA.1395-97). Even at this point, DISH did not declare impasse and left open the possibility future bargaining because a new negotiator would be representing DISH at the bargaining table. (ROA.1401).

The parties understanding as of December 2014 is crucial because it was the last time substantive discussions occurred between the parties prior to the April 2016 declaration of impasse. Yet, the agreement of the parties to meet and bargain first on December 8-9, 2014 and then subsequently over the December 9th

proposals undermines the existence of impasse because "the Union had expected continued bargaining," and DISH had agreed to as much. *Carey Salts* at 416. The pregnant pause in discussions after December 2014 and DISH's failure to resume face-to-face negotiations as promised is substantial evidence that the parties were not at impasse.

c. *Impasse is a temporary condition that cannot be presumed, but DISH did so in 2016 by making unfounded assertions as to the futility of negotiations and ignoring that the passage of time and its own change in negotiators opened new opportunities at the table.*

Impasse is not a permanent status; it is transient and temporary and can be broken by events at the bargaining table such a new proposals and events in the workplace such as a strike. *Charles D. Bonanno Linen Serv., Inc. v. NLRB*, 454 U.S. 404, 412 (1982). DISH, however, argues that impasse was permanent between the parties beginning at an unspecified time prior to April 2016 and continuing through the declaration of impasse. (DISH Brief at 45-46).

The law of this circuit, however, recognizes that in addition to concessions, discussed above, "the mere passage of time" can defeat the existence of an impasse. *Gulf States*, 704 F.2d at 1399; *see also Raven Servs. Corp. v. NLRB*, 315 F.3d 499, 506 (5th Cir. 2002) (noting that the passage of two years between a declaration of impasse and unilateral implementation supports the conclusion that impasse had broken by the time of implementation.). Further, the change of bargaining representatives can present new dynamics at the bargaining table so as

to likewise defeat an impasse. *Raven Servs.*, 315 F.3d at 505. Finally, DISH's self-serving 2016 correspondence does not show the parties to be deadlocked.

1. DISH's self-serving correspondence does not establish a deadlock.

Throughout early 2016, DISH marched towards impasse and asserted in a conclusory fashion that further negotiations would be fruitless. (ROA.1405, 1427, 1461). CWA, on the other hand, continuously requested bargaining in response to DISH's impasse drumbeat. (ROA.1407-08, 1447, 1452). DISH's refusal to come to the bargaining table in the spring of 2016 is additional evidence of its efforts to deploy impasse as a means to destroy, rather than enable, bargaining. *Carey Salt* at 415-16 (citing *Bonanno Linen*, 454 U.S. at 412). Contrary to the requirements of good faith bargaining, DISH did not seek to return to the table but instead engaged in unlawful self-help by declaring impasse to bring an end to negotiations.

DISH asserts that CWA offered no indication in 2016 that it would be more flexible on the QPC. (DISH Brief at 19). This proposition is wholly rebutted by the Union's continuous offers to bargain that fell of the deaf ears of DISH. It is also telling on this point that DISH, through its representative, never expressly questioned the Union's flexibility on QPC during its 2016 correspondence, even though it contended at trial that it was testing the Union's flexibility on an issue that it never expressly raised. (ROA.122). Despite not raising the issue of the QPC in its correspondence, DISH faulted CWA for not stating it would be flexible

on QPC in 2016. (ROA.123-24). If Dish was trying to test the Union's flexibility, it could not expect the Union to pass the test if it did not know the question being asked of it. DISH's claim that the Union was inflexible on the QPC in 2016 is not supported by the record in this case and this fact undermines the case for a deadlock and impasse.

Under the Act, DISH's letter writing campaign in 2016 does not rise to the level of good faith bargaining. Rather, it was an effort to orchestrate an impasse in bad faith to undermine the prospects of bargaining. The bottom line of the correspondence is that DISH was looking for a way to end negotiations and declare impasse and CWA was looking to return to the table. DISH's efforts to seize on anything to support its argument is evidence of the bad faith with which it approached the Union in 2016 and this bad faith undermines DISH's claim that a lawful impasse existed in 2016.

2. The passage of time undermines the existence of an impasse.

The principle that the passage of time can break an impasse has been followed by the Board and it has held, based on *Gulf States*, the passage of one year "was clearly a sufficient period for cooling off and taking a second look at earlier positions." *Airflow Research & Manufacturing Co.*, 320 NLRB 861, 862 (1996) (citing *Gulf States* at 1399); *see also Circuit-Wise, Inc.*, 309 NLRB 905, 921 (1992) (holding that a fourteen month passage of time was sufficient to

undermine an employer's claim of impasse because "Anything that creates a new possibility of fruitful discussion (even if it does not create a likelihood of agreement) breaks an impasse.").

The reasoning of the court and the NLRB on this matter is consistent with the proposition that good faith bargaining requires any occurrence that presents the possibility of agreement must be pursued before impasse can lawfully be declared. The mere passage of time could soften positions that were previously hardened or, more pertinent to this case, provide DISH with the 2015 attrition data to take to the bargaining table to negotiate over the wages. This point is all the more compelling g because whereas the 2014 attrition rates of approximately 30% in both locations were significantly higher than the still high attrition rates in 2015 of 13% and approximately 20% at the two locations. As argued earlier, the proper place for bringing up the attrition date is the bargaining table and not briefing to the NLRB or the court. The passage of over a year from December 2014 to January 2016 provided DISH with the time to muster these facts and the opportunity to present them in bargaining. DISH declined to do so, and instead opted terminate bargaining through an unjustified, and unlawful, declaration of impasse.

3. DISH's change in negotiator presents an opportunity for negotiations that defeats the existence of an impasse.

Like the passage of time, the change in DISH's negotiator also created a new possibility of fruitful discussion. *Raven Servs.* at 505; *Gulf States* at 1399. A new

negotiator at the table creates a new dynamic. Thus, while DISH may have its own goals for bargaining that its new negotiator would continue to advocate, the Act requires DISH to be receptive to CWA's proposals and while Section 8(d) permits DISH to standby its positions, it cannot come to the table determined not to budge from its position. *NLRB v. Gen. Elec. Co.*, 418 F.2d 736, 763 (2d Cir. 1969).

Here, DISH's negotiator prior to 2016 had such a contentious relationship with CWA that he noted in his last correspondence with the Union's negotiator that "I suppose that the good news for you is that I will not be representing DISH in the future." (ROA.1401). The possibility of a new dynamic at the table resulting from a new bargaining representative for DISH created an opportunity under *Gulf States* and *Raven Services* that DISH was required to explore before declaring impasse in 2016 and its failure to do so renders the April 2016 impasse unlawful.

II. The Board's order as to the constructive discharges should be enforced.

The Board's finding that seventeen employees were constructively discharged following DISH's decision to unilaterally impose a drastic wage cut and implement other terms and conditions of employment, such as healthcare benefits, should be enforced. Substantial evidence establishes that DISH imposed the wage cut and other unilateral changes with the intent to compel employees to quit leaving it in a *de facto* state of being union-free because the Union's supporters would be gone. Additionally, the record is devoid of evidence

previously relied on by the court to support finding there was no constructive discharge.

a. DISH constructively discharged seventeen employees.

A constructive discharge "involves an employee who quits after being confronted by his employer with the Hobson's choice of resignation or continued employment conditioned on the relinquishment of rights guaranteed by Section 7 of the Act." *White-Evans Co.*, 285 NLRB 81, 81-82 (1987) (citing *Remodeling by Oltmanns*, 263 NLRB 1152, 1162 (1982)). Put directly, a Hobson's Choice places an employees in a predicament where they must decide between their union and their job. *NLRB v. CER, Inc.*, 762 F.2d 482, 487 (5th Cir. 1985). The Fifth Circuit has held that there are two elements to a constructive discharge that violates Section 8(a)(3) of the Act, which are

> First, the employer's conduct must have created working conditions so intolerable that an employee is forced to resign. Second, the employer must have acted "to encourage or discourage membership in any labor organization" within the meaning of Section 8(a)(3) of the Act. *NLRB v. Haberman Constr. Co.*, 641 F.2d 351, 358 (5th Cir. 1981).

As to the first factor, DISH imposed a wage cut of upwards of 50% percent in April 2016. (ROA.1397, 1866, 1972). These unilaterally imposed wage rates were from $5.00 to $8.00 an hour lower for some technician titles in the bargaining unit than their counterparts made at non-union facilities in the Dallas-Fort Worth area. (ROA.1972). As noted in the Obere text, DISH desired employees to quit in

response to these changes. (ROA.1470). Thus, while not proclaiming an express desire to discourage membership, the functional equivalent would be reached as bargaining unit employees quit and correspondingly support for CWA diminished and ultimately ceased to exist.

This outcome, highlighted by the Obere text, is analogous to the intent to go open shop identified by the Fifth Circuit in *Haberman* as creating an intolerable condition sufficient to support finding a constructive discharge. *Haberman*, 641 F.2d at 358. Dish's extreme wage cut in April 2016 coupled with the Obere text constitutes substantial evidence to satisfy the first prong of the *Haberman* analysis for constructive discharges.

The second prong of *Haberman*, conduct to discourage union membership, is established by one of two types of employer acts that amount to conduct inherently destructive of important employee rights under the Act. The fist type is conduct that "jeopardizes the position of the union as bargaining agent or diminishes the union's capacity effectively to represent the employees in the bargaining unit." *Haberman* at 359. The second type is conduct "which directly and unambiguously penalizes or deters protected activity." *Id.* As in *Haberman*, there is no difficulty in placing DISH's conduct in this case in either category. *Id.* at 360.

DISH's wage cut and other unilateral changes made in conjunction with the Obere text amount "to a repudiation of its bargaining obligation." *Id.* The text

states, and Obere testified, that wage cut was made with the expectation that bargaining unit employees would quit. The text cements the proposition that DISH did not bargain in good faith and did not declare impasse in good faith because it desired to create circumstances that would rid it of bargaining unit employees and its obligation under the Act to bargain with CWA as to the wages and working conditions of those employees. The second category, conduct that penalizes or deters protected activity, is established because DISH imposed wages on the bargaining unit employees below the wages earned by its non-union employees. This fact, when coupled with the DISH's anticipation of employees quitting because of the cut in pay as expressed in the Obere text, establishes that DISH sought to rid itself of CWA by ridding itself of bargaining unit employees, an act inherently destructive of employee rights because it penalizes employees for the exercise of those rights by forming and affiliating with a union.

b. *Loss of the right to negotiated working conditions gives rise to a constructive discharge.*

DISH argues in its brief that no constructive discharge is present in this case because such an unlawful act cannot be premised on changes in wages or working conditions. (DISH Brief at 51-54). As such, DISH argues, the employees were never put to the Hobson's Choice of loss of employment or employment predicated on the surrender of employee rights under the Act. This argument misses the mark because it oversimplifies the relevant law, fails to appreciate that negotiated wages

and working conditions are rights protected by the Act, and does not give weight to DISH's conduct toward its employees.

The Board has long recognized that the right to collectively bargain and the working conditions that result from it are rights protected by the Act. In an early constructive discharge case, the Board framed the right to collectively bargained working conditions and how the deprivation of that right gives rise to a constructive discharge. In *Superior Sprinkler, Inc.*, 227 NLRB 201 (1976), the Board addressed multiple constructive discharges that resulted from the employer's decision to withdraw from a bargaining relationship and impose its own working conditions on its employees:

> Superior unlawfully refused to bargain with the Union and thus . . . offered its employees the choice of accepting the employer's unlawful repudiation of its statutory bargaining obligations and working under unlawfully imposed conditions of employment or quitting their employment. Thus, the employees' continued employment would be conditioned upon their abandonment of rights guaranteed them under the Act, that is, the right to bargain collectively through representatives of their own choosing. **Forcing employees to make such a choice; namely, to work under illegally imposed conditions or to quit their employment "discourages union membership almost as effectively as actual discharge."** *Superior Sprinkler*, 227 NLRB at 210 (emphasis added, citations omitted).

The logic of *Superior Sprinkler* provides valuable guidance in this case. *Superior Sprinkler* involved an employer who refused to sign a successor labor agreement because of the contract's wage scale and its employees quit rather than work

under wages unilaterally imposed by the employer. *Superior Sprinkler*, 204 NLRB at 206-07.

In this case, and in any bargaining unit, employees, including the dischargees in this case, have the right to bargain through their representative for working conditions. That right was taken from the DISH bargaining unit employees, including the dischargees, when DISH unlawfully imposed its wage cut, resulting in a dramatic reduction in wages for the technicians. DISH undertook the wage cuts, per the Obere text, to force employees to quit. (ROA.1470.) DISH undertook this course of action to undermine union support. DISH therefore in April 2016 presented employees' with a Hobson's Choice; waive their right to a wages and working conditions negotiated by your representative for the purpose of collective bargaining and continue to work, or quit. The dischargees opted to quit, and DISH's decision to put the dischargees in this predicament where they had to choose between their Section 7 rights or continued employment violated Section 8(a)(3).

This court distinguished *Superior Sprinkler* in holding that there were no constructive discharges in *Electric Machinery Co. v. NLRB*, 653 F.2d 958 (1981). The court in *Electric Machinery* characterized *Superior Sprinkler* as placing that employer's conduct within the realm of inherently destructive conduct for purposes of a constructive discharge because the employer made changes in mandatory

terms and conditions of employment without reaching impasse with the intention of ridding itself of the union so the employer could operate as an open shop. *Electric Machinery*, 653 F.3d at 965.

In the *Electric Machinery* decision, however, the court found no evidence that the employer sought to rid itself of the union because the employer was not overtly trying to create a non-union company, negotiations were ongoing and the union believed that an agreement could be reached, and the employer urged the employees to stay. *Electric Machinery* at 965-66. Significantly for the court, the employer even agreed to voluntarily abide by the prior labor agreement for thirty-day intervals for up to six months so long as negotiations proceeded in good faith. *Id.* No analog to these facts are present in this case.

DISH, through the Obere text, told employees in no uncertain terms that it was cutting bargaining unit pay rates so as to encourage employees to quit; the net effect being the union supporters would leave and DISH would become a *de facto* open shop by virtue of no longer employing CWA supporters. The text cannot be dismissed as the statement of a lone supervisor. Obere has always characterized the substance of the text as the position of DISH rather than his own point of view. Obere testified that learned the facts communicated in the text from Regional Manager Thomas and that DISH understood employees might quit in response to these changes. (ROA.183, 186.) Obere further testified regarding a statement he

provided to DISH that Thomas stated it was preferable "if technicians resigned on their own." (ROA.212, 1852.)

Another fact counseling against applying *Electric Machinery* so as to find no constructive discharges in this case is the absence of ongoing negotiations at the time of the constructive discharges. In 2016, CWA demanded bargaining for three months prior to impasse. (ROA.1407-08, 1447, 1452.) DISH not only refused to meet and bargain, it reiterated the demand that the bargaining unit vote on its December 2014 terms by referencing the absence of a ratification vote on two separate occasions in 2016. (ROA.1405, 1427, 1429.) The absence of ongoing negotiations at the time of employee quits in turn deprived CWA of taking the position that negotiations could bear fruit and employees should therefore not quit. The absence of this fact is further indication that *Electric Machinery* does not bar finding constructive discharges in this case.

There was also no request by DISH that employees stay following its unilateral implementation of the wage cut and other terms and conditions of employment. On the contrary, the Obere text and Obere's testimony concerning the text unequivocally establish that DISH desired employees to quit as a result of the wage cut and other unilateral implementation of terms. Finally, DISH, unlike the employer in *Superior Sprinkler*, made no commitment to maintain terms pending negotiations or even offered such an analogous olive branch. The

opposite occurred; DISH simply and unilaterally implemented wages and terms of employment with the intent that those working conditions force employees to quit.

These circumstances create the classic framework for a Hobson's Choice between the employees' right to collectively bargained wages and conditions of work, as recognized in *Superior Sprinkler*, and continued employment. Here, the absence of the facts that led the *Electric Machinery* court to find no constructive discharges support finding the seventeen employees at issue in this case to have been constructive discharged in violation of Section 8(a)(3) and that decision and order is supported by substantial evidence. The court should therefore enforce the Board's order that DISH violated Section 8(a)(3) of the Act by constructively discharging the seventeen employees who quit following the unilateral wage cut and implementation of other terms and conditions of work.

III. CWA joins with the Board's arguments including those that pertain to the portions of the order uncontested by DISH on appeal, which should be granted enforcement.

CWA joins with the Board, as argued in its brief, as to the reasons the decision and order should be enforced and adopts those reasons as its own. (NLRB Brief at 17-42). Specifically, CWA joins with the Board in urging that the portions of the Board's order uncontested by DISH, including DISH's conditioning bargaining on a ratification vote and the termination of Dakota Novak, be granted enforcement for the reasons advanced by the Board in its brief. (NLRB Brief at 17-18).

CONCLUSION

The weight of substantial evidence in this case leads inescapably to the conclusion, as held by the Board, that DISH violated Section 8(a)(5) of the Act by unilaterally changing working conditions, including a significant wage cut, and refusing to bargain with CWA, the statutory bargaining representative of its employees in Farmers Branch and North Richland Hills. These changes in turn caused seventeen employees to be constructively discharged because they had been deprived of their statutory right to wags and other conditions of work negotiated by their Union. For all the foregoing reasons, and those raised by the Board in its brief, Intervenor Communications Workers of America, AFL-CIO prays the court sustain and enforce the decision and order of the National Labor Relations Board in this case.

Respectfully Submitted,

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on February 11, 2019, I electronically filed the foregoing with the Clerk of Court using the CM/ECF System, which will send notice of such filing to all registered CM/ECF users.

I further certify that, upon acceptance and request from the Court, the required paper copies of the foregoing will be deposited with United Parcel Service for delivery to the Clerk.

The necessary filing and service were performed in accordance with the instructions given to me by counsel in this case.

Dated: February 11, 2019

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of FED. R. APP. P. 35(b)(2)(A) because this brief contains 8,614 words, excluding the parts of the brief exempted by FED. R. APP. P. 32.

2. This brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft® Word 2013 in 14-point font size in Times New Roman.

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